DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-120
Hawaii Administrative Rules

July 17, 2008

SUMMARY

1. §3-120-2 is amended.

2. §3-120-4 and 3-120-5 are amended.

3. Chapter 3-120 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 120

GENERAL PROVISIONS (INTERIM)

§3-120-1	Purpose
§3-120-2	Definitions
§3-120-3	Applicability
§3-120-4	Procurements exempt from chapter 103D, HRS
§3-120-5	Procedures for requesting exemption and amendment
§3-120-6	Repealed

§3-120-1 Purpose. (a) The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and construction for the State and counties, by:

(1) Simplifying, clarifying, and modernizing the law governing procurement;
(2) Requiring the continued development of procurement policies and practices;
(3) Making the procurement laws of the State and counties as consistent as possible;
(4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;
(5) Providing increased economy in procurement activities and maximizing best value to the fullest extent practicable;
(6) Fostering effective broad-based competition within the free enterprise system;
(7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and

98 23

(8) Increasing public confidence in the procedures followed in public procurement.

(b) This chapter 120, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules previously adopted on 6/9/01 (file no. 2360) and 11/15/01 (file no. 2397). [Eff 12/15/95; comp 11/17/97; comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; comp AUG 25 2008] (Auth: HRS §103D-202) (Imp: SSLH 1993, Act 008, §1)

§3-120-2 Definitions. Definitions are in section 103D-104, HRS. The following definitions are also applicable to terms used in subtitle 11:

"Administrator of the state procurement office", hereinafter referred to as "the administrator", means the administrator as provided in section 103D-204, HRS, or the administrator's desginee.

"Bid" means the executed document submitted by a bidder in response to an invitation for bids, or a multi-step bidding procedure.

"Bidder" means any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated.

"Chief procurement officer" means the chief procurement officer for state entities and the several counties as provided in section 103D-203, HRS, or the officer's desginee.

"Contractor" means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the contract with the State, and acting directly or through its agents or employees.

"Cost analysis" means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

"Cost data" means information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

"Days" means calendar days unless otherwise specified.

"Designee" means a person appointed by the head of a purchasing agency to act on its behalf with delegated

authority.

"Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and which may be an indication of the reasonableness of price.

"Head of the purchasing agency" means the head of any agency with delegated procurement authority.

"Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids under the competitive sealed bidding source selection method.

"Offer" means bid, proposal, or quotation.

"Offeror" means any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, directly or through a duly authorized representative or agent, an offer for the good, service, or construction contemplated.

"Paying agent" means, as to bonds of any particular series, the director of finance or the bank or trust company designated for the payment of the principal and redemption price (if any) of, and interest on, the bonds or such series in the series resolution authorizing the issuance of such series or the series certificate relating to such series.

"Person" means individuals, partnerships, corporations, associations, or public or private organizations or any character other than a governmental body.

"Price analysis" means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

"Price data" means factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both the general contractor and subcontract prices.

"Procurement officer" means any person with delegated authority to enter into and administer contracts and make written determination with respect thereto. The term includes an authorized representative acting within the limits of authority.

2823

The delegated authority is received from the chief procurement officer directly or through the head of a purchasing agency or designee to the procurement officer.

"Proposal" means the executed document submitted by an offeror in response to a request for proposals.

"Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals under the competitive sealed proposal source selection method.

"Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals.

"Solicitation" means an invitation for bids, a request for proposals, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a state contract.

"State" means the judiciary, the legislature, office of Hawaiian affairs, department of education, University of Hawaii, Hawaii Health Systems Corporation, remaining departments of the executive branch and all governmental bodies administratively attached to them, and the counties.

"Subcontractor" means any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.

"Support facility provider" means a bank, a national banking association, an organization subject to registration with the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 or any successor provisions of law, a federal branch pursuant to the International Banking Act of 1978 or any successor provisions of law, a savings bank, a saving and loan association, an insurance company or association chartered or organized under the laws of any state of the United States of America, the Government National Mortgage Association or any successor thereto, the Federal National Mortgage Association or any successor thereto, or any other federal agency. [Eff 12/15/95; am and comp 11/17/97; comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; am and comp AUG 25 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-120-3 <u>Applicability.</u> These rules shall apply

to:

(1) The procurement practices of all entities created by the State's and counties' constitutions, charters, statutes, ordinances, administrative rules, or executive orders, including the office of Hawaiian affairs, and the departments, commissions, councils, boards, bureaus, committees, institutions, authorities, legislative bodies, agencies, government corporations, or other establishment or office of the executive, legislative, or judicial branches of the State or its several counties; and

(2) All procurement contracts made by governmental bodies, whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement. [Eff 12/15/95; am and comp 11/17/97; am and comp 6/19/99; comp 6/9/01; comp 11/15/01; comp 11/8/02; comp AUG 25 2008] Auth: HRS §103D-202) (Imp: SSLH 1993, Act 008, §1; HRS §§103D-102, 103D-111)

§3-120-4 <u>Procurements exempt from chapter 103D, HRS.</u> (a) Notwithstanding the intent of chapter 103D, HRS, to require governmental bodies to procure their goods and services through competitive bidding, it is acknowledged that there may be situations where procurement by competitive means is either not practicable or not advantageous to the State.

(b) Exhibit A titled "Procurements Exempt From Chapter 103D, HRS" 07/17/08 is located at the end of this chapter. This exhibit provides a list of goods and services which the procurement policy board has determined to be exempt from chapter 103D, HRS, because although such goods and services may be available from multiple sources, their procurement by competitive means would be either not practicable or not advantageous to the State.

(c) Chief procurement officers may request periodic reports from the heads of purchasing agencies of procurements made pursuant to subsection (b). The heads of purchasing agencies may be required to include in their reports, descriptions of the process or procedures the agency used to select the vendor ensuring maximum fair and open competition whenever practicable.

(d) Chief procurement officers may request that additional exemptions be added to Exhibit A.

(e) The procurement policy board shall review Exhibit A annually or more frequently as needed for amendments.

(f) Purchasing agencies making procurements which are exempt from chapter 103D, HRS, are nevertheless encouraged to adopt and use provisions of the chapter and its implementing rules as appropriate; provided that the use of one or more provisions shall not terminate the exemption and subject the procurement of the purchasing agency to any other provision of the chapter.

(g) Purchasing agencies shall cite on the purchase order or on the contract, the authority waiver as "Exempt From Chapter 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number from the exhibit), Hawaii Administrative Rules". [Eff 12/15/95; am and comp 11/17/97; am and comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; am and comp AUG 25 2008] (Auth: HRS §§103D-102, 103D-202) (Imp: HRS §103D-102)

§3-120-5 Procedures for requesting exemption and amendment. (a) When the head of a purchasing agency determines that a situation exists wherein procurement by competitive means would be either not practicable or not advantageous to the State, a request for an exemption may be made to the appropriate chief procurement officer as follows.

Prior to procurement:

(1) Heads of purchasing agencies shall submit a written request to the chief procurement officer and certify to the best of their knowledge that the information provided is true and correct.

(2) The request shall be made on a form provided by the chief procurement officer.

(b) The chief procurement officer shall post a

copy of the request on an Internet site accessible to the public for seven days.

(1) Any inquiries shall be directed to the designated contact person of the purchasing agency stated on the notice.

(2) Any objections to the request for the exempted procurement shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted.

(c) In determining whether to approve the request, the chief procurement officer shall consider the circumstances of each individual case and may approve the exemption for the term of the contract.

(d) Amendments to contracts exempted from chapter 103D, HRS, under this section, that would change the original scope of the contract, may only be made with the prior approval of the chief procurement officer. To amend a contract exempted from chapter 103D, HRS, the purchasing agency shall complete and submit a request for an amendment to the chief procurement officer. The certification requirement as provided in subsection(a)(1) and the posting and approval procedures as provided in subsections (b) and (c) shall be followed.

(e) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

(f) The chief procurement officer shall forward a copy of each request and amendment, if any, to the administrator. [Eff 12/15/95; comp 11/17/97; am and comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; am and comp AUG 25 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-102)

§3-120-6 REPEALED. [R 11/8/02]

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to and compilation of chapter 3-120, Hawaii Administrative Rules, on the Summary Page dated July 17, 2008 were adopted as interim rules at the Procurement Policy Board meeting on July 17, 2008. Pursuant to section 103D-202, HRS, these rules shall be issued by Procurement Directive and be effective for not more than eighteen months.

These interim rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

PAMELA A. TORRES
Chairperson
Procurement Policy Board

RUSS K. SAITO
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General

Filed Lt. Governor's Office
AUG 14 2008

"EXHIBIT A"

HAR Chapter 3-120
PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS
07/17/08

The following list of exemptions, pursuant to HAR §3-120-4, has been determined to be exempt from HRS Chapter 103D by the procurement policy board:

Exemption Number	Exemption
1.	Research, reference, and educational materials including books, maps, periodicals, and pamphlets, which are published or available in print, video, audio, magnetic, or electronic form, including web-based databases;
2.	Services of printers, rating agencies, support facility providers, fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
3.	Services of lecturers, speakers, trainers, facilitators and scriptwriters, when the provider possess specialized training methods, techniques or expertise in the subject matter;
4.	Services of legal counsel, guardian ad litem, psychiatrists, psychologists, receivers and masters when required by court order;
5.	Fresh meats and produce;
6.	Insurance to include insurance broker services;
7.	Animals and plants;
8.	New or used items which are advantageous and available on short notice through an auction, bankruptcy, foreclosure, etc.;
9.	Food and fodder for animals;

Exemption Number	Exemption
10.	Facility costs for conferences, meetings, and training sessions;
11.	Advertisements in specialized publications, such as in ethnic or foreign language publications, trade publications, or professional publications;
12.	Arbitrator and mediator services;
13.	Interpreter services;
14.	Procurement of repair services when dismantling is required to assess the extent of repairs;
15.	Burial services consisting of mortuary, crematory, cemetery, and other essential services for deceased indigent persons or unclaimed corpses;
16.	Radio and television airtime when selection of station is based on the targeted audience (i.e. ethnic or age group, gender, etc);
17.	Subscription costs and registration or workshop fees for conferences or training; and
18.	Court reporter services.